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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1039

W. J. DILLNER TRANSFER COMPANY, a Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated April 22, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Prayer	1
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Proceedings below	3
Brief in support of Petition	4

Appendix:

Opinion below	1a
Judgment	5a

TABLE OF CASES

Kulp & Gordon v. U. S., 144 Fed. Supp. 456	3
Movers Conference of America et al. v. U. S., 205 Fed. Supp. 84	2, 4
U. S. v. English, 139 Fed. 2nd 885	2, 4
Peter Verbeem et al. v. U. S., 356 U. S. 676	5

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner W. J. Dillner Transfer Company, prays that a writ of Certiorari issue to review a criminal conviction in the District Court for the Western District of Pennsylvania, affirmed by the Court of Appeals for the third Circuit by judgment denying reargument dated March 26, 1963.

OPINION BELOW

The formal opinion of the Court below was filed Mar. 6, 1963, but no citation is available yet. A copy is annexed.

JURISDICTION

This Court has jurisdiction of this proceeding under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Will the opinion below create a conflict between the Court of Appeals decision in the 5th circuit in the *U. S.* v. *English* 136 Fed. 2nd, 885, (1944) which was not appealed by the government. Thus we may have one rule in the 5th Circuit and a different one in the 3rd Circuit.

2. Does the opinion below conflict with the decision in *Movers Conference of America Inc., et al* v. *U. S.* 205 Fed. Supp. 84, holding that the commission has no power to make rules which would restrict the scope of a previously granted Certificate. This petitioner obtained full authority to serve all points in New Jersey on June 1, 1948, without restrictions as to Commercial Zones, while this prosecution was and is conducted under a rule making decision issued by the Commission in 1952, four years later. Recent decisions, accepted by the government in other districts hold that a Certificate may not be subsequently restricted regardless of its "grand-father" status. This petitioner was also a "grand-father" carrier and could not be restricted by subsequently established restrictions unless they were shown in its certificates.

3. Did the opinion below err in determining the question of "knowingly and willfully" committing the

violations here involved without according proper and sufficient weight to a decision in *Kulp & Gordon* v. *U. S.* 144 Fed. Supp. 456.

4. The questions involved are of national transportation importance and should be determined upon full consideration of each and every element thereof.

STATUTES INVOLVED

Section 206 of the Interstate Commerce Act. (306 U.S.C. Title 49).

Section 222 (a) of the Interstate Commerce Act, (332 U.S.C.).

Section 212 (a) of the Commerce Act, (312 U.S.C.).

PROCEEDINGS BELOW

The government filed criminal counts against petitioner for alleged unlawful transportation of property for hire from Fairless and Plymouth Meeting, Pa. (suburbs of Trenton, N. J. and Philadelphia, Pa.) no question was raised as to specific commodities the issue was territorial. Petitioner a common carrier by motor truck was granted two I. C. C. certificates, one in 1942 and another in 1948. Both of these grants related to and included points in New Jersey on various commodities. Petitioner has never been restricted as to service from and to entire commercial zones until this proceeding was instituted.

Petitioners motions to dismiss were denied by the trial Court and a trial was had before a jury which resulted in conviction. A motion for new trial was denied. The judgment of conviction and sentence was appealed to the Court of Appeals for the third Circuit and the judgment below was affirmed and motion for re-argument was denied.

BRIEF STATEMENT OF REASONS FOR GRANTING PETITION

The appendix filed herewith contains a comprehensive brief in support of petitioners position, however, counsel wishes to point out the following in brief form.

(a) The trial Court did not have before it the decision in *Movers Conference of America* v. *U. S.* 205 Fed. Supp. 84 and the appellate Court appears to have ignored it.

(b) The appellate Court disposes of the decision in *U. S. v. English* 139 Fed. 2nd 885 by merely saying "has not been followed and we think it is unsound". Counsel has found that the Interstate Commerce Commission accepted the English decision without any attempt to review it. Repudiation of the *English* decision by the government at this late date results in conflict and confusion.

(c) The action of the Commission in ordering the prosecution of your petitioner without serving that order upon petitioner was clearly a failure in procedure.

(d) The prosecution of petitioner under a rule making order that was made four years subsequent to your petitioners last Certificate, (issued without restriction as to Commercial Zones) creates a very dangerous precedent in that it condones ex post facto restrictive rules and orders, made by Federal Regulatory Agencies. Such governmental policies are destructive and derogatory to the true administration of justice. The com-

mission has not finally decided petitioners pending question.

(e) The Commission in all fairness should have given petitioner an adequate hearing for the purpose of determining whether the previously issued Certificates should be restricted. Petitioner's application for relief to the Interstate Commerce Commission in M.C. 21623 Sub. 81 has not answered the question.

(f) The questions involved are few and relatively simple but the far reaching consequences of the resulting conflicts of law are of broad nation wide import.

(g) Petitioner is being prosecuted for defending its rights. The Court below was obviously confused (page 2 second paragraph of opinion), "we think it clear that the fact that no administrative proceeding is pending to establsh "grandfather" rights is not an element of the statutory offense of operating without an authorizing certificate". The Court fails to recognize that the Certificate issued to petitioner in 1948 was an extension of its "grand-father rights". See *Peter Verbeem et al* v. *U. S.* 356 U.S. 676. Petitioner did have an original "grand-father" proceeding in 1942 and it resulted in a Certificate *without* Commercial Zone restrictions, and the 1948 Certificate was likewise issued unrestricted, as to New Jersey. The administrative question is still undecided.

Wherefore, the petitioner prays that this petition be granted and the decision below be reviewed.

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Dated April 22, 1963.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,098

UNITED STATES OF AMERICA

v.

W. J. DILLNER TRANSFER COMPANY, a Corporation,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 11, 1963

Before: KALODNER, HASTIE and GANEY, *Circuit Judges*.

Opinion of the Court

(Filed March 6, 1963)

By HASTIE, *Circuit Judge*.

The appellant corporation, W. J. Dillner Transfer Co., is a common carrier by motor vehicle, which conducts its business under authority of Certificate of Public Convenience and Necessity No. MC-21623, dated June 1, 1948, authorizing it to transport certain commodities "between points and places in . . . Ohio, West Virginia, Delaware, New Jersey and New York". An information charged this carrier with several violations of section 206(a) of the Interstate Commerce Act, added by 49 STAT. 551 (1935) as amended, 49 U.S.C. § 306(a), which are made misdemeanors by section 222(a) of the Act, added by 49 STAT. 564 (1935), as amended, 49 U.S.C. § 322(a), in that it transported commodities from Plymouth Meeting and Fairless, Pennsylvania, to points in Ohio, thus knowingly and willfully operating beyond the territorial limits of its certificated

authority. A jury found the carrier guilty as charged and appropriate fines were imposed. This appeal followed.

We consider first the appellant's argument that the information should have been dismissed for its failure to negative an exception which section 206(a) makes to its requirement that a motor carrier refrain from operations not sanctioned by its certificate. The exception permits a carrier to conduct an uncertificated operation while litigating before the Interstate Commerce Commission an asserted right to continue that operation regardless of present public convenience and necessity on the ground that it originated in the so-called "grandfather" days, prior to June 1, 1935. We think it clear that the fact that no administrative proceeding is pending to establish "grandfather" rights is not an element of the statutory offense of operating without an authorizing certificate. In a proper case the pendency of such an administrative proceeding is a defense, although in this case it is not even contended that this defense is available. In any event, it is not necessary to anticipate that defense in the formal charge of operating without certificated authority. *United States* v. *Apex Express, Inc.*, D.N.J. 1948, 76 F. Supp. 956; *United States* v. *Kelly*, N.D. Ind. 1945, 63 F. Supp. 977; *United States* v. *Cooper's Express, Inc.*, D. Mass., June 8, 1962, Crim. No. 60-248-W. The only decision to the contrary, *United States* v. *English*, 5th Cir. 1944, 139 F. 2d 885, has not been followed and we think it is unsound.

At trial appellant admitted carrying commodities from the Pennsylvania communities of Fairless and Plymouth Meeting to points in Ohio, although the provision of its certificate upon which it relied in terms covered no more than operations from points in New Jersey to points in Ohio. It is appellant's theory that Fairless and Plymouth Meeting in Pennsylvania are within the "commercial zones" of the cities of Trenton and Camden, New Jersey, and, hence, are covered by its authorization to operate in

New Jersey. The trial court rejected this contention as a matter of law. This ruling was clearly right. In *Commercial Zones and Terminal Areas*, 1952, 54 M.C.C. 21, 92-93, the Commission ruled that certificates which grant operating authority limited to a described territory do not authorize service to any point outside of that territory, even though the point in question may be within the commercial zone of a municipality within the described territory. This unequivocal ruling clearly covers the present situation. It is a reasonable construction of general application to certificates granted in terms of a described territory. Nothing has been pointed out to indicate any administrative deviation from this interpretation. Admittedly, the Commission's ruling had repeatedly been brought to appellant's attention.

It is also urged on this appeal that appellant is entitled to serve Fairless and Plymouth Meeting because they are within the area served by the appellant's predecessor in the "grandfather" days. But appellant operates as a certificated carrier pursuant to a formal administrative determination of the territory it may serve. It has neither sought nor obtained from the Commission a broadening of its certificated authority on the basis of the alleged "grandfather" rights which it would have us consider. Contemplating that such rights are matters for administrative determination, Congress has provided in section 206(a) of the Act the narrow permission to continue uncertificated operations while "grandfather" claims are pending before the Commission. Otherwise, a court must accept the carrier's certificate as the source and the definition of its authority. Thus, it is no defense to a charge of operating beyond the limits of its certificate that the carrier believes that it can show "grandfather" rights broader than its certificate.

Finally, there is no merit to a contention of the appellant that requisite willfulness was not established in this

case. Appellant knew that its certificate expressly covered New Jersey but did not in terms cover neighboring points in Pennsylvania. It also knew that the certificate as interpreted by the Commission did not give implied sanction to operations to or from these neighboring Pennsylvania points. Moreover, it took no administrative action to challenge this interpretation or to obtain a modification of its certificate. The charge on willfulness was extremely favorable to appellant. The court told the jury that even if the appellant's certificate did not authorize the transportation in question, there could be no conviction if appellant honestly believed that it did so. On the evidence the jury was justified in concluding that appellant's conduct was a deliberate refusal to respect the plain limitations of the certificate under which it was operating.

The conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Received and Filed March 6, 1963

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,098

UNITED STATES OF AMERICA

v.

W. J. DILLNER TRANSFER COMPANY, *Appellant*

On Appeal From the United States District Court
for the Western District of Pennsylvania

Present: KALODNER, HASTIE and GANEY, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF

March 6, 1963

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a)[1] is not yet reported.

[1] Pet. App. refers to the appendix contained in the Petition for a Writ of Certiorari. App. I refers to Appellant's Appendix in the court of appeals. App. II refers to Appellee's Appendix in the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5a) was entered on March 6, 1963. A petition for rehearing was denied on March 26, 1963. The petition for a writ of certiorari was filed on April 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a criminal information alleging that petitioner had operated as a common carrier by motor vehicle without a certificate of public convenience and necessity in violation of Section 206(a) of the Interstate Commerce Act is defective if it fails to negate an exception contained in the proviso to that section by alleging that no application for a certificate giving effect to "grandfather rights" is pending before the Commission.

2. Whether a certificate limited to a described territory authorizes service to a point outside that territory but within the commercial zone of a municipality within the territory.

3. Whether the evidence shows that petitioner "knowingly and willfully" operated beyond the limits of its certificate.

STATUTES INVOLVED

Section 206 of the Interstate Commerce Act (49 U.S.C. 306) provides in pertinent part:

> (a)(1) Except as otherwise provided in this section . . . no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on

any public highway . . . unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That . . . if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time . . . the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served . . . if application . . . is made to the Commission . . . within one hundred and twenty days after this section shall take effect [October 1, 1935] . . . Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part . . . Pending the determination of any such application the continuance of such operation shall be lawful * * *.

* * * * *

Section 222(a) of the Interstate Commerce Act, (49 U.S.C. 322) provides in part:

(a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license . . . shall, upon conviction thereof, be fined not less than $100 nor more than $500 for the first offense and not less than $200 nor more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

* * * *

STATEMENT

Petitioner, W.J. Dillner Transfer Co., is a common carrier by motor vehicle, operating under a Certificate of Public Convenience and Necessity No. MC-21623, dated June 1, 1948, which authorizes it to serve a multi-state area, including "points and places in Pennsylvania, West of U.S. Highway 15, * * * and * * * points and places in New Jersey" (App. I. 22a). On November 23, 1959, a seventeen count information was filed in the United States District Court for the Western District of Pennsylvania charging petitioner with transporting goods from Plymouth Meeting and Fairless, Pennsylvania, (East of U.S. 15) in violation of the territorial restrictions contained in petitioner's certificate (App. I. 4a-11a). Petitioner admitted the acts alleged, but contended that, though the points involved were not within its *Pennsylvania* territory, it could serve these communities under its authority to operate in *New Jersey* since Plymouth Meeting was within the commercial zone of Camden, New Jersey and Fairless within the commercial zone of Trenton, New Jersey (App. I. 15a, 18a-19a). In addition, petitioner moved to dismiss the information on the ground that it failed to negative the specific exception set forth in Section 206(a) pertaining to "grandfather" rights (App. I. 12a, 16a). The district court denied this motion. After a trial by jury, petitioner was found guilty and fined $2,731.92 (App. I. 2a-3a). On appeal, the conviction was affirmed.

ARGUMENT

1. Petitioner was charged with transporting goods in violation of the territorial restrictions set forth in a described certificate. As the court below ruled, it is not an element of that offense that no administrative proceeding is pending to establish "grandfather" rights to conduct the unauthorized transportation. In *McKelvey* v. *United States*, 260 U.S. 353, this Court stated (p. 357):

> By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it.
>
> * * *

This rule has been followed by several courts in cases involving uncertificated operation of motor carriers. See *United States* v. *Cooper's Express, Inc.*, Crim. No. 60-248-W (D. Mass.) decided June 8, 1962 (App. II. 3b-4b); *United States* v. *Apex Express, Inc.*, 76 F. Supp. 956 (D.N.J. 1948); *United States* v. *Kelly*, 63 F. Supp. 977 (N.D. Ind. 1945).

Petitioner relies on *United States* v. *English*, 139 F. 2d 885 (C.A. 5), a decision rendered in 1944 before the Rules of Criminal Procedure made clear by Rule 7(c) that an indictment need be only "a plain, concise and definite written statement of the essential facts constituting the offense charged." While in our view the

English case is erroneous on its own facts, it is, in any event, distinguishable. There the charge was operating without any certificate, whereas here petitioner was accused of violating the specific limitations of a granted certificate. On the present charge, a claim of pending application to determine grandfather rights beyond the certificate would clearly be merely a matter of defense.

2. Petitioner operates under a territorial certificate in which the scope of permissible operations is defined by physical boundaries forming the perimeter of a broad area, rather than in terms of specific municipalities authorized to be served. The Interstate Commerce Commission has consistently held that motor-carrier authority so defined cannot be construed as allowing any service at any point beyond the limits prescribed, not even collection and delivery service to and from points within the commercial zone of an authorized border municipality. *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, 92-94; *Transportation Activities of Tornetta*, 48 M.C.C. 637; *Commercial Zones and Terminal Areas*, 48 M.C.C. 441. Petitioner's reference to "grandfather" rights is irrelevant since he has never applied to the Commission for a certificate to serve Plymouth Meeting or Fairless based on operations performed in the "grandfather" days as required by the proviso in Section 206(a). Nor is there any merit to the argument that the Commission's rulings are *ex post facto*. The cited decisions only make explicit the already implicit limitations of certificates defined in terms of territorial boundaries. Unlike *Movers Conference of*

America v. *United States*, 205 F. Supp. 82 (S.D. Cal. 1962), cited by petitioner (p. 4), there is in this no attempt to change an existing rule through an "interpretive" order so as to cut down authority previously granted. The rulings were announced in 1948 and 1952, and petitioner, if not otherwise aware of it, was expressly told in correspondence in 1957 with the District Supervisor that the Commission had consistently refused to consider operations beyond the boundaries of a territorial certificate (Appx. L. 48a-51a). Petitioner had ample warning of the prohibited conduct.

3. Although, as noted, petitioner was fully informed as to the Commission's view of the limitations of its certificate it took no action to challenge or obtain a modification of its certification. Rather, in 1958 it chose to ignore the restriction and engage in the transportation set forth in the information. A "knowing and willful act" within the meaning of Section 222(a) means one that is conscious and intentional, deliberate and voluntary, rather than merely negligent. Specific criminal intent is not required. *Inland Freight Lines* v. *United States*, 191 F. 2d 343 (C.A. 10); *United States* v. *Joralemon Brothers, Inc.*, 174 F. Supp. 262 (E.D.N.Y. 1959); *United States* v. *Reid*, 110 F. Supp. 253 (D. Md. 1953). On this evidence, the jury was more than justified in concluding that petitioner's conduct was a deliberate refusal to respect the plain limitations of the certificate under which it was operating. This was all the words "knowingly and willfully" required.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1963

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